No. 14,122

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

Appellant's Closing Brief

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There are a good many indications in appellee's brief that it agrees with our main contention that the present case is essentially a "fact case," and, therefore, should not have been disposed of by a summary judgment.

It is true that appellee's brief makes no such express confession; to the contrary its counsel stoutly and ably contend that Johnson should not be allowed to recover on any theory. But nevertheless, counsel find it necessary at almost every point in their brief to support their arguments by

alleged "facts." These "facts," it turns out, are merely counsel's version of a keenly contested factual situation on the material issues in the case.

Before turning to a discussion of counsel's arguments addressed to the main points of our opening brief, let us take up a few examples of their ultimate reliance on "facts" which are not admitted, but are disputed, and on which there should be a trial.

It seems to be counsel's main contention that the 1937 Indenture executed by Tuolumne to RFC is controlling; that since the provisions of that document contain no direct promise to pay Johnson for the dredge, Johnson has no rights thereunder; and that, in view of the parol evidence rule, Johnson could not introduce evidence to alter the terms of the written instrument (Br. p. 6). Admitting that the moneys provided by the RFC were sufficient to have paid Johnson, and admitting further that RFC permitted the loan funds to be applied to other uses, counsel claim "whether there was anything wrongful about it is a matter of legal argument, not a question of fact * * *" (Br. p. 5).

However, in our brief, page 44, we cited the so-called "lender-builder" cases wherein it was established that if it was the purpose and intent of the parties to a building loan to finance a particular construction, and the builder relied on the loan, giving up his mechanic's lien or similar first security in favor of the lender's first mortgage, then the lender is obligated in equity to devote the loan moneys to this intended purpose. This is true regardless of the fact that the loan documents are between the lender and the owner only, and the builder is not a party thereto.

Therefore, we contend that we are entitled to prove that it was the basic purpose and intent of all concerned in the present transaction that Johnson would be fully paid, up to

the agreed contract price of the dredge, from the RFC loan; that Johnson relied on this understanding, and would not have yielded title to the dredge to the RFC otherwise. This is a genuine issue as to a material and essential fact.

The parol evidence rule would not enter into the presentation of this evidence. By attempting to have this court hold that the 1937 Indenture is the sole and exclusive evidence of the obligations of the parties, counsel attempt to exclude the very facts which are the basis of the rule stated in the lender-builder cases. Obviously there is no basis for such exclusion.

Another example of counsel's attempt to have its version of the facts accepted as the only correct version, is found in its lengthy review of the correspondence (Br. pp. 9-12). This review proposes to establish that there is no dispute over the alleged "facts" that RFC did not promise to pay Johnson anything (Br. p. 9); and that Johnson was never led to neglect or forego any legal rights or remedies (Br. p. 12). It is claimed that because these letters are contrary to Mr. Johnson's affidavit and deposition, this court should hold the latter "unbelievable," and accept the writings as the whole truth of the matter.

No better example of the existence of a genuine issue as to a material fact could be presented than this. On the one hand, counsel offer the letters; on the other hand, we offer Mr. Johnson's testimony; the letters tend to prove that no promises to pay Johnson were made; Mr. Johnson's testimony directly states that promises were made. A trial on the merits cannot be avoided. It will develop the truth of the dispute. Each party will present its witnesses. All witnesses will be subject to cross examination. There is no better way to determine the true facts.

A summary judgment cannot be granted in this state of the facts. The situation is reminiscent of that in *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 88 L. Ed. 967 (1944), where, notwithstanding a strong preponderance of affidavits on the side of the party who moved for a summary judgment, the Supreme Court held that one affidavit alone to the contrary was sufficient to raise an issue of fact sufficient to entitle the resisting party to a trial on the merits.

Another instance of disputed facts concerns the negotiations between Johnson and RFC for a settlement. Counsel attack the affidavits of Johnson, Hise, Smith and Kelly on the ground that they "barely touch on the material issues and do not detract from the admittedly true facts which show that RFC is entitled to judgment as a matter of law." (Br. pp. 16, et seq.) There is no question, however, but that these affidavits show repeated efforts to settle; that RFC encouraged the negotiations until October, 1949, and thereafter in August 1951 encouraged a different mode of settlement (Tr. 224-6). Not once in these negotiations was there any suggestion that Johnson's claims were barred by limitations or laches. The evidence, therefore, tends to prove waiver of and estoppel to assert these defenses. In attempting to show that these affidavits failed to prove that RFC agreed to pay Johnson, counsel entirely overlooked the effective manner in which these affidavits show that RFC waived limitations and laches.

One last example of appellee's further unwitting adherence to our position that the facts are genuinely in dispute is found in its argument that Johnson failed to show that the representatives of RFC had power or authority to waive limitations or laches or to raise an estoppel against the RFC (Br. p. 61). The record, however, shows that the representatives in question were for the most part the very

same persons who wrote and signed the RFC correspondence on which counsel so vigorously rely elsewhere in their brief (Norton and McCartney). If those individuals had authority for the purposes claimed by counsel, it would be presumed that they had authority to bind RFC in other respects. Furthermore, any facts bearing upon the limited powers of the individuals in question were within the ability of RFC, rather than Johnson, to produce. If the lack of authority on the part of those individuals is seriously raised, we think that appellee cannot help agreeing with us that there is an issue of fact which could not be decided without a trial on the merits. In both the cases cited by counsel on this subject at the top of page 61 of their brief, there had been trials on the merits.

We confidently asserted in our opening brief that the instant case is essentially a "fact case," and we feel that the foregoing examples, wherein opposing counsel themselves have relied on disputed facts, confirm this position. Therefore, a summary judgment should not have been granted.

THE JUDGMENT OF FORECLOSURE WAS NOT RES JUDICATA AS TO JOHNSON'S COUNTERCLAIM

RFC raises the point for the first time that the judgment of foreclosure which RFC obtained after RFC obtained a summary judgment on Johnson's counterclaim is res judicata not only as to the foreclosure, but also as to the counterclaim.

This argument is not worthy of serious consideration. The fact is that RFC's complaint for foreclosure and Johnson's counterclaim for a money judgment against RFC were treated as separate and independent controversies in the lower court. This was recognized, so far as RFC is concerned, by its prosecution of the separate proceedings which

resulted in the summary judgment on counterclaim from which this appeal is taken. The motion for summary judgment (Tr. 173), the opinion of Judge Lemmon (Tr. 243-274) and the Final Judgment on Counterclaim (Tr. 275), all relate to, are directed toward, and deal exclusively with the Johnson counterclaim.

On the other hand, the judgment which RFC subsequently obtained related exclusively to the foreclosure on the dredge, and did not in any way directly or indirectly purport to deal with Johnson's claims for a money judgment against RFC. We could demonstrate this more clearly were the records in the foreclosure proceedings before this court, but, of course, they are not.

It is well settled that that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged (CCP Sec. 1911). It frequently happens that a court or litigants may treat rights, claims or demands separately and differently and withdraw them from the scope of a judgment. Where this occurs, the judgment is not res judicata as to matters not so passed upon (50 C.J.S. 104). Where the judgment specifically expresses the issues determined and on which the relief is granted, only the issues so specified will be res judicata (50 C.J.S. 130).

I.

The Court Below Failed to Observe the Limited Scope of a Motion for Summary Judgment

In our opening brief, we complained that Judge Lemmon's Memorandum Opinion reads as though this case were being decided as if a trial on the merits had occurred. We showed that in at least three places in the Opinion the court considered issues "on the merits"; on another occasion, the Opinion "weighed" an issue, and on a further occasion, it

criticized Johnson's failure to "establish" the truth of a fact. We showed moreover that the Opinion proceeded as if there were no issue at all on the crucial questions of intent and purpose of the parties in the 1937 transaction. It did not consider any questions of waiver and estoppel regarding limitations and laches; as to the "wrongfulness" of RFC's disbursements; nor did it consider the nature and extent of RFC's unjust enrichment in using and taking the proceeds of the machine which Johnson built but which RFC failed to pay for.

Appellee points out (Br. p. 15) that the "effect" of a summary judgment is "an adjudication," and argues from this that the court below had the right to decide "on the merits." This is but a quibble, since our criticism of the opinion had nothing to do with the effect of the adjudication, but was directed plainly and directly toward a decision purportedly based on all the merits, when the full facts were not before the court at all.

Counsel cite *Suckow Borax Mines Consol. v. Borax Consol.,* 185 F.2d 196 (C.A. 9, 1950). There plaintiff's attempt to escape summary judgment was based solely on one alleged issue of fact, namely, whether plaintiff "had no knowledge, intimation or cause to believe" that a conspiracy existed prior to 1944. However, the record showed conclusively that this allegation was incorrect and the issue was not treated as genuine. The basic rule as to summary judgments was clearly respected. There is nothing in the state of facts in the instant case which remotely suggests that Johnson's claims of fact are not genuine.

II.

Johnson's First Cause of Counterclaim

Appellee contends (a) there was no third-party contract, and (b) the claim was barred by limitations or laches. We shall discuss these points in the order stated.

Judge Lemmon assumed, without deciding, that Johnson's claim as the beneficiary of a third-party contract was valid, but that such claim was barred by limitations. Accordingly, our opening brief on the first cause of counterclaim was restricted to demonstrating the error in Judge Lemmon's holding as to limitations, and for that reason did not discuss the third-party beneficiary theory.

Upon the basis of extensive authorities, we believe that the question whether a party is a beneficiary of a contract depends largely upon the "intent" of the parties thereto, and particularly upon the intent of the promisee. In cases somewhat similar to ours, a supplier has thus been held to be the beneficiary of such a contract.

Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931);

Woodhead Lumber Co. v. E. G. Niemann Investments, Inc., 99 Cal. App. 456 (1929);

City of Richmond v. Goodloe, 308 Ky. 549, 215 S.W. 2d, 128 (1948);

Niemann v. Nadelman, 136 Misc. 386, 240 N.Y.S. 47 (1930).

See also

Corbin on Contracts, Vol. 4, Sec. 776.

Under the cases cited there would be a genuine issue of a material fact as to the intent of the parties to the 1937 transaction, to be determined by testimony of the parties

thereto and material surrounding circumstances. Since the facts were not presented, and since the court below did not and could not pass upon the merits in any event, it would serve no useful purpose to pursue this phase of the case further.

The holding that Johnson's claim was barred by limitations was shown to be clearly erroneous at pages 28-36 of our opening brief. There we show that the court ignored and disregarded all the evidence showing that RFC waived and was estopped to assert the statute of limitations. We cited a case which we believed directly in point, *Begnaud v. White,* 170 F.2d 323 (C.C.A. 6, 1948), and a California case quite similar on its facts, namely, *Adams v. California Mutual B. & L. Ass'n,* 18 C.2d 487 (1941).

Counsel do not discuss these important cases. We submit that the reasoning and conclusion of those cases should be adopted by this court.

Appellee's argument that the RFC is not estopped to raise defenses of limitations and laches is set forth at pages 57-61 of the brief. The argument begins by an unfair attempt to characterize Johnson's claim as a plea for governmental paternalism. Appellee cites *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947) which was decided by a five to four vote and has been universally criticized as a retrogressive decision. The case is clearly distinguishable from our case in that the authority of the FCIC agent was a matter of public record in the Federal Register. That is not true of RFC officials whose authority is no more a matter of public record than if they were employed by a private corporation. The decision deprived a farmer of the benefits of crop insurance he had supposedly obtained from a government agency. In a dissenting opinion, Justice Jackson said in part:

> "I * * * would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment" (p. 388).

We venture to suggest that a recent change in the membership of the Supreme Court might well make Justice Jackson's views the law of the land.

Appellee's argument that its own employees may not have had the power or authority to waive limitations or to estop the RFC merely presents a question of fact as has already been shown.

The ultimate issue as to estoppel to assert the statute of limitations is, as we have consistently contended, a "fact issue." The affidavits, deposition and other material in the court below show without question that RFC in 1938 offered Johnson $40,000 in payment of the balance he claimed (Tr. 412); that RFC failed to pay the full balance claimed by Johnson because of a dispute raised by Tuolumne as to the amount thereof (Tr. 214); that Tuolumne improperly obtained $15,000 of the Construction Fund before this time, although there was still a balance of $40,000 in the Fund which would be paid to Johnson as soon as it was proper to do so (Tr. 215). After Johnson obtained a judgment against Tuolumne, one of the legal representatives of RFC recommended that $65,000 be paid to Johnson (Tr. 227-228). Further negotiations took place on the basis of a possible settlement of $75,000 (Tr. 239). There is much additional evidence reviewed in our opening brief at pages 10-14 showing that both McCartney and Norton, who represented the RFC, promised that RFC would see that Johnson was paid when the litigation with Tuolumne was ended.

On the basis of the *Begnaud* and *Adams* cases, supra, it is absolutely clear that the above facts, if proved at trial to

be true, would constitute a waiver or estoppel so far as limitations is concerned. Therefore, we say that there is no escape from the conclusion that Judge Lemmon erred in disregarding this evidence when he held that Johnson's claims were barred by limitations.

What we have just said with respect to limitations applies with equal force to counsel's arguments concerning limitations on the remaining causes of action in Johnson's counterclaim. It will, therefore, be unnecessary to repeat this discussion as the subsequent causes of counterclaim are taken up.

III.

Johnson Had an Equitable Lien in the Unexpended Balance of the Construction Fund. When RFC Diverted the Fund, It Became Liable to Johnson

Johnson's claim for an equitable lien rests upon the basic theory applied in *Smith v. Anglo-Calif. Trust Co.,* 205 Cal. 496 (1928); *Pacific Ready-Cut Homes, Inc. v. Title I. & I. Co.,* 216 Cal. 447 (1932) and *Theatre Realty Co. v. Aronberg-Fred Co., Inc.,* 85 F.2d 383 (8th Cir. 1936). In its brief, appellee does not dispute this theory. In short, the theory is that when a lender agrees to loan money to an owner to finance construction of a building, taking a mortgage prior to mechanic's liens, then all the loan funds must be devoted to costs of construction. The builder has an equitable lien on any part of the loan fund not used for that purpose.

In this case RFC agreed to loan money to Tuolumne, through the Construction Fund, to finance construction of the dredge, taking in return a mortgage prior to any claim of Johnson, the builder. Johnson relied on the loan for payment. Then RFC, which had complete control over the use of these funds (Tr. 38-39), did not devote all the funds to this purpose. Thus Johnson had an equitable lien on the

unexpended funds, under the authority of the above cases. Then RFC diverted these funds to other uses (Tr. 412-13). By so doing, RFC became personally liable to Johnson under recognized principles such as the liability of a depositary who pays a deposit to a party not entitled thereto. Thus in the *Pacific Ready-Cut Homes* case, the lender paid the balance of the loan moneys to itself to apply on the loan, and there was, of course, no question but that this unauthorized payment subjected it to liability.

The same result is reached under the estoppel theory advanced in our opening brief (pp. 37-40).

Appellee asserts four arguments in reply. *First,* it is said that an equitable lien is a remedy only, predicated on a pre-existing right (Br. pp. 30-31, 38). We agree that such liens are equitable remedies. However, as the *Smith* and other cases make clear, there need be no recognized pre-existing legal right on the part of a builder against the lender. The very heart of the above cited decisions is that, because there was no recognized legal right, and since the builder was so clearly entitled to relief, the equitable lien was imposed as a suitable remedy. In view of these decisions, it cannot be doubted today that a builder does have at all times at least an equitable right against the lender to have the loan fund used strictly for its intended purposes.

Second, appellee relies on the rule that the lender need only advance all the money, and if he does so, his obligation is at an end, even if the builder is unpaid (Br. pp. 31-34, 38, 46-47). But that principle gives RFC no protection. RFC did not advance all the money; rather it diverted it to other uses (Tr. 397-8, 412-13). The words of the Court in the *Pacific Ready-Cut Homes* case are most in point:

> "The defendant mortgage company, having received the benefit of plaintiff's performance in the form of a

> completed building and therefore a more valuable security for its note, is not justified in withholding *or appropriating to any other use* money originally intended to be used to pay for such performance and relied upon by plaintiff in rendering its performance." (Emphasis added) (P. 452).

RFC appropriated the money to another use—it thereby became liable to Johnson. In *Crescent Lumber Co. v. Borchers,* 59 C.A. 2d 318 (1943), the lender did not divert the funds, but used them all to pay the contractors. The Court held that the lender was not obligated to advance more than it had agreed to loan.

Third, RFC contends that the theory benefits only those who have filed mechanic's liens (Br. pp. 34, 37). By this contention, appellee ignores the fact that Johnson is subrogated to the mechanics' liens of the subcontractors (Tr. 216-217). But even more important, the California rule is that filing for a mechanic's lien *is not* a prerequisite of an equitable lien. *Whiting-Mead Co. v. West Coast B & M Co.,* 66 C.A. 2d 460 (1944); 18 So. Cal. L. Rev. 261 (1945); 16 So. Cal. L. Rev. 264 (1942). The one case appellee cites to the contrary, *City Lumber Co. v. Park,* 14 C.A. 2d 431 (1936) merely states that the equitable lien cases then decided imposed equitable liens "in favor of the holder of a mechanic's lien * * *"—a dictum of negligible bearing on appellee's contentions.

Fourth, appellee insists again and again that Johnson has no claim because he obtained no lien (Br. pp. 36-37, 47). That is the very argument the courts rejected in the *Smith* and other "builder" cases. The point of these cases is that the builder gives up his right to a lien in reliance on being paid from the loan funds. These cases hold that in such circumstances, the lender must use all the loan money for the purposes intended. RFC is liable as a result. It diverted the money to other uses.

IV.

RFC Was Unjustly Enriched at Johnson's Expense When It Took All the Earnings from the Dredge, Leaving Johnson Unpaid

The basis of Johnson's claim for unjust enrichment is set forth in its opening brief (pp. 47-49, 54-59). Appellee does not contend RFC was not enriched; it was enriched by receipt of the earnings, and even by receiving the dredge as security without paying for it in full. The issue is whether the enrichment was unjust, and that is a question of fact. There is a mass of evidence on this point, and the unjustness as well as the extent of the enrichment cannot be determined without passing on the evidence.

Johnson urges that the Construction Fund was to be used to pay for the dredge, and in reliance thereon, it took neither a lien nor retained title as was its usual practice. (Tr. 213). Tuolumne had no funds to pay for the dredge (Tr. 212-13) and could get funds only from the earnings. By the Indenture RFC had complete control of these earnings (Tr. 47-50, 193). Thus when RFC diverted the balance of the Construction Fund to other uses, in equity and justice it had to leave some earnings available to pay Johnson. Instead it took them all, leaving Tuolumne insolvent. RFC was thereby unjustly enriched.

Appellee makes four contentions on this point also. *First,* it is said that Johnson knew that the earnings were to go to RFC (Br. p. 42). But Johnson did not know or agree that RFC would divert the Construction Fund from its intended source of paying for the dredge in full. The injustice of the enrichment stems from the fact that RFC appropriated to itself *all* sources of funds, using them to pay its claims, even those junior to Johnson's. If RFC's contentions were sound, the principles established by the lender-builder cases would

be valueless. Such contentions would enable lenders to induce builders to yield the title and liens to the proposed construction in reliance upon the loan funds. Then, after construction was finished and the loans were well secured, the lenders could appropriate not only the unexpended balance of the loans for themselves, but could take the rents, issues and profits of the building or other construction also. It was to avoid such abhorrent results that the doctrine of the lender-builder cases was adopted.

Second, appellee says Johnson can have no lien on the fund because the fund is gone (Br. pp. 42, 44, 46, 48). This is but another way of stating RFC's second argument discussed in III above. But as we said there, it is indeed a naive idea that one who holds a fund subject to a lien can spend it without becoming liable to the lien claimant. Nor is it any answer to say that Johnson should have enjoined diversion of the fund (Br. p. 44). By not doing so, Johnson may have lost claims against bona fide purchasers, but not against the wrongdoing transferor.

Third, appellee asserts it received no property belonging to Johnson (Br. p. 45). Of course it is obvious that to recover, Johnson need not show it had legal title to the earnings. The question is whether, under all the facts, Johnson was entitled, in equity, to be paid from them. Clearly it begs the question to say he is not because they were not his property—that is the very question this Court must decide.

Fourth, the Construction Fund could be used for "working capital," appellee insists (Br. p. 47). But this argument ignores the fact that before Johnson entered the transaction, he was shown by RFC a list of the uses to which the fund was to be put (Tr. 398). This is a dispute of fact to be settled at trial. Also, it assumes that Johnson's rights against RFC are governed solely by RFC's contract with

Tuolumne. But that is not so, any more than the builders in the *Smith, Pacific Ready-Cut Homes,* and *Theatre Realty* cases were limited by the loan agreement with the owner. It is not enough to look at the four corners of the Indenture (Br. pp. 6, 22, 47), as these cases clearly establish. The representations and promises made, and inducements offered by RFC directly to Johnson, are basic. They are in dispute, and, a trial is necessary to resolve the dispute.

V.

RFC Is a Constructive Trustee for Johnson

The constructive trust is another remedy used by equity for the purpose of working out right and justice. *Pomeroy, Equity Jurisprudence,* Vol. 1, Sec. 155; Vol. 4, Sec. 1044 (5th Ed. 1941). We have seen that in this three-party deal, RFC assumed control of all of Tuolumne's assets and earnings. The arrangement provided a means to pay for the dredge, which RFC chose to disregard. Then RFC appropriated the earnings to itself, using them in part to pay off its second mortgage which was junior to Johnson's claim. By controlling all sources of funds for paying Johnson, RFC thereby assumed the duty to use the loan funds as it had originally promised to do, or at least to release to Tuolumne other funds for payment for the dredge.

To these principles, appellee attempts two answers, excluding the reiteration of points previously discussed. *First,* appellee claims that in a constructive trust, the claimant must have an interest in specific property (Br. p. 49) or a beneficial interest (Br. p. 48), and that Johnson had no right under the contract to either the dredge or its earnings (Br. p. 50).

Second, it is asserted that Johnson is but a general creditor of Tuolumne (Br. p. 52) and that a debtor may prefer

one creditor over another (Br. pp. 50, 51). These two contentions will be answered together. It is of course true that if Johnson had been fully paid, as was intended, out of the Construction Fund, it would have no right to payment from the earnings. But Johnson was not so paid, and it is submitted that, for the reasons already set forth, Johnson did obtain an equitable interest in the earnings of the dredge. Whether Johnson had such an interest in them is the question which must be decided. The decision on that point depends upon all the facts which are in issue in this case.

Johnson does not concede that this issue, or indeed any issue in this case, is to be decided by reference solely to the written documents, excluding the promises, representations of fact and conduct of RFC which are a part of the record. However, the Indenture alone makes it clear that RFC and Johnson were not intended to be creditors on an equal basis so that Tuolumne's alleged preference of one over the other was proper. This document clearly evidences an intent of all concerned that the dredge would be paid for in full; that it would then be put into operation, and after all costs of operation were paid, the net earnings would be used to pay off RFC's loan. The Construction Fund was the device set up to pay for the dredge, as we have already shown (Tr. 38-39). Any part of this Fund remaining after "completion of the construction work" was to be transferred to the Sinking Fund (Tr. 39), which was to be the source of funds for payment of interest and principal on RFC's loan (Tr. 49-50).

The proceeds from operation of the dredge were to go in their entirety into the Trust Fund (Tr. 47-48). This Trust Fund was to be used to pay costs of operation and expenses or obligations incurred in connection with the project (Tr. 48). Then, from time to time, funds were to be transferred

from the Trust Fund to the Sinking Fund, but if sufficient funds were not available to be transferred "they shall be so transferred as soon as available." (Tr. 48-49) From the Sinking Fund they would then go to RFC (Tr. 49-50).

The Indenture contemplated, therefore, that the dredge would be paid for first from the Construction Fund. Then general creditors of Tuolumne would come next, being paid from the Trust Fund. As a result of these facts, Tuolumne's general creditors had claims to the earnings from the dredge prior to those of RFC which had to rely on the Sinking Fund. Any surplus remaining in the Trust Fund would then be transferred to the Sinking Fund for repayment of the RFC loan. In effect, RFC, while a creditor as far as Tuolumne was concerned, was furnishing money in the nature of equity capital in its relation to Tuolumne's other creditors.

That this was the relationship envisaged by the parties is evidenced by their actions. Tuolumne put all its assets and earnings under RFC control. Johnson agreed to build the dredge and transfer title, free of liens, in reliance upon a Construction Fund which was completely under RFC control. And as a creditor of Tuolumne, Johnson had to look for payment to the Trust Fund (containing all the earnings) which was also under RFC control. Under the circumstances, it is incorrect to say that Tuolumne could prefer RFC if it wished, for in fact RFC made all the decisions and RFC chose to prefer itself in spite of the clear intent of the Indenture and surrounding circumstances to the contrary.

Referring again to the claim that there is no property upon which to impose a constructive trust, the provisions of the Indenture would seem to provide that either the Construction Fund, (Tr. 38-39) or the Trust Fund (Tr. 47-48)

or both, are such property. It is clear that a constructive trust can be imposed on a sum of money. *Church v. Bailey,* 90 C.A. 2d 201 (1949). In any case, the constructive trust doctrine is not as appellee would have the court believe.

It applies where one receives money to which he is not entitled. *Pomeroy, Equity Jurisprudence,* Vol. 1, Sec. 1047 (5th Ed. 1941). And where one is unjustly enriched at the expense of another, equity will impose a constructive trust. *Scott on Trusts,* Vol. 3, Sec. 461, 462.2 (1939). The facts of this case, as they will be brought out at trial, and even as they appear in the documents and limited facts of the record of this summary proceeding, demand that a constructive trust be imposed.

Appellee makes one final point: that Johnson should have attached or enjoined to protect itself (Br. p. 51). But Tuolumne had nothing which was free of RFC control, in the first place, and in any case, one who improperly transfers funds belonging to another cannot escape liability because the victim did not enjoin or otherwise prevent the wrongful transfer.

VI.

The Sales Tax Was a Cost of the Dredge for Which RFC Is Liable to Johnson in the Same Manner as It Is Liable for the Other Costs of the Dredge

Appellee appears to believe that Johnson bases its claim against RFC for the sales tax upon a bare admission by RFC that Johnson was entitled to reimbursement (Br. pp. 55-6). This, of course, is not true, as a careful reading of Johnson's opening brief will make clear (Br. pp. 65-7). Johnson's claim is that the sales tax was a cost of the dredge to the same extent as the other cost items that went into its construction. Johnson has shown that it is entitled to be

paid in full by RFC for these other costs. It should be paid for the sales tax by RFC for the same reasons.

When Johnson and Tuolumne executed the construction contract, they recognized that a sales tax might be imposed upon Johnson so they expressly provided that Johnson would be reimbursed if such an eventuality occurred (Tr. 199-203). RFC approved this arrangement. Thus all parties realized that a claim of Johnson for reimbursement might arise at once or long after the Construction Fund had been disbursed in which case Johnson would be forced to rely upon Tuolumne's earnings which were under RFC control. Johnson, therefore, was entitled to be repaid from the earnings of Tuolumne. Furthermore, Johnson was entitled to be repaid from the earnings of Tuolumne prior to any diversion of them to RFC. RFC had no direct claim upon the earnings. It had to rely upon the Sinking Fund which was replenished from the Trust Fund (earnings) but only if sufficient funds were available for the transfer (Tr. 48). By knowingly appropriating funds which were the only funds available to reimburse Johnson, and by appropriating them in the face of Johnson's valid claim to them which the terms of the Indenture gave priority over repayment of the RFC loan, RFC held those funds equitably for Johnson.

CONCLUSION

Although the facts and theories involved in the pending case are complicated, the issue on this appeal is a simple one.

We have demonstrated that genuine issues of fact existed and that Johnson was prevented from having a trial upon them. It follows that the summary judgment was erroneous and should be reversed. Appellee has made no real effort to deny the existence of a genuine issue of fact con-

cerning equitable estoppel to assert the statute of limitations. Appellee has made no attempt to answer the authorities which we cited on this point and which appear to be "on all fours" with this case.

But, in addition to the issue of equitable estoppel, we have shown that genuine issues exist as to the fundamental questions of the purpose and intent of the original financing, the wrongfulness of the disbursement of the RFC funds, and the nature and extent of the unjust enrichment which arose from RFC's control.

The simple analysis of this appeal is that RFC should have paid Johnson for the dredge, that he has never been paid, and that he is entitled to his day in court to prove that he is entitled to payment. There must be a trial "on the merits" in the interests of justice.

Respectfully submitted,

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